

OGC 80-03544
25 April 1980

STATINTL

MEMORANDUM FOR: [REDACTED]

STATINTL

FROM: [REDACTED]

Office of General Counsel

SUBJECT: Official Release of Classified Information

REFERENCE: Memorandum, dated 27 November 1979, from
C/CRD to C/ISS & GC, Subj. Decision Requested
on Point of Executive Disclosure Related to
to Pentagon Papers

1. By referenced memorandum, the Chief, Classification Review Division, has requested advice from this Office on whether there is any merit to the position that the release of the Pentagon Papers by the Defense Department may not constitute an authorized "executive disclosure" as to CIA's information if CIA has not concurred in the release. Since you, on behalf of C/CRD, and I have discussed this question on numerous occasions, this memorandum merely summarizes the opinions I have already expressed to you.

2. As you are aware, classified information may be declassified by the classifiers, a successor, or a supervisory official of either. See Executive Order 12065, Section 3-102. Moreover, the "third-agency rule" requires each agency that has received classified information from another agency to obtain the consent of such agency before disseminating the information to any third agency. This requirement, a carryover from the predecessor Order of Executive Order 12065, i.e., Executive Order 11652, establishes the principle under which executive agencies operate when attempting to declassify information: coordination is essential. While the Order authorizes lower echelon employees also to exercise declassification authority, I am aware of no provision that would permit one agency of the government unilaterally to declassify and release information classified by another government agency. This principle is further evidenced in regulations implementing Executive Order 12065, including ISOO Directive No. 1 with respect to coordinating the review of information during mandatory review requests.

OGC Has Reviewed

3. Nevertheless, this Executive branch principle that only the classifying agency, or agency otherwise having classification jurisdiction, may declassify information fairly may be said to be effective only so long as it is actually followed, since a release of classified information by any agency may be said to "effectively" declassify that information by placing it in the public domain. While administrative sanctions may be appropriate if an agency fails to observe the coordination requirements, the situation alters if an individual's First Amendment rights are at stake. Thus, there is no single answer to your question.

4. When information becomes available to the public, it becomes difficult to maintain that a republication of that information will cause additional damage to the national security. That is not to say that such an argument can never be made, particularly if the executive has not yet confirmed the initial disclosure; however, the more extensive the dissemination, the greater the difficulty in subsequently maintaining that that or similar information will cause damage if released. Moreover, as to particular documents that are released by an executive agency, it will be extremely difficult, if not impossible, to explain how a republication would cause additional damage to the national security.

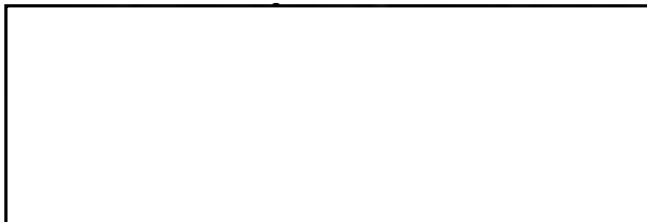
5. You have asked for a general analysis of the legal effects of an agency's releasing the information of another agency without the latter agency's consent. Although I have indicated to you the specific requirements of Executive Order 12065, valid as operating procedure to be followed by all Executive branch agencies, clearly a flat rule and inflexible adherence to the "letter" of the Order will not be valid for all purposes. With respect to a release in the FOIA context, the Agency will be required to reach a decision on the merits of the case itself, with primary attention devoted to determining the identifiable damage to the national security that could be expected to result from the contemplated disclosure. It is conceivable that there could be evidence of damage so great that deletions of offending language would still be appropriate. I suggest, however, that the burden of proof will invariably be a difficult one in such cases.

6. Moreover, Agency officials reviewing manuscripts submitted for prepublication review cannot assert the continued classification of documents already in the public domain, because there exist constitutional requirements evidenced by case law with respect to freedom of speech and prior restraints (See the Knopf case). To argue that U.S.

documents placed by one agency in the public domain were not "officially" released and, therefore, that information derived therefrom is subject to sanitization because of a violation of the third-agency rule would fly in the face of reality, be inconsistent with such precedent, and, therefore, would stand no chance of success in this context. Please do not hesitate to contact me if you have any questions or comments.

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ROUTING AND RECORD SHEET

STATINT

SUBJECT: (Optional) Decision Requested on Point of Executive Disclosure Related to Pentagon Papers

FROM:
Chief, Classification Review Division
211, Key

EXTENSION

NO.

ISS 79-095/1

DATE

27 November 1979

TO: (Officer designation, room number, and building)

DATE

RECEIVED

FORWARDED

OFFICER'S INITIALS

COMMENTS (Number each comment to show from whom to whom. Draw a line across column after each comment.)

1. Chief, ISS
5B-2830, Hqs.

29 NOV

*[Handwritten initials]*1 to 3:

2.

3. C/CRD
211, Key

12/3

[Handwritten initials]

I am unaware of any specific provision governing this issue. My inclination is to accept the DDO interpretation, but I will wait to make a decision until OGC has treated the matter. It may be necessary to take the matter to the IRC. *[Handwritten mark]*

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15.

Att: ISS 79-095

cc: IMS/DDO
GC

79-095

27 November 1979

MEMORANDUM FOR: Chief, Information Services Staff
General Counsel

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ATTENTION:

[REDACTED]

STATINTL

FROM:

[REDACTED]

Chief, Classification Review Division

SUBJECT: Decision Requested on Point of Executive Disclosure
Related to Pentagon Papers

1. The DO is considering taking a very narrow view of what constitutes executive disclosure in the case of the study entitled "United States - Vietnam Relations, 1945-1967" which was printed for the House Committee on Armed Services in 1971 in its declassified form. This study, commonly known as "The Pentagon Papers," had been reviewed and declassified by the Department of Defense which apparently did not formally coordinate with CIA. This version included classified and other protectable CIA information. After some research into the matter, [REDACTED] Special Assistant to C/IMS, is convinced that the Agency never intended to make executive disclosure of its material at the time. Mr. [REDACTED] concludes, therefore, that release of that version of "The Pentagon Papers" does not constitute authorized executive disclosure as far as the Agency is concerned. A copy of Mr. [REDACTED] memorandum on this matter is attached as Attachment A.

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2. CRD, on the other hand, has considered the publication of this version of the "Pentagon Papers" as constituting executive disclosure and information which is, therefore, in the public domain. In early 1979 CRD reviewed this version of the "Pentagon Papers" and listed all information relating to CIA so classification reviewers would know what information had been released. A copy of that paper is attached as Attachment B.

3. Addressee views are requested as to whether the DO position is the official Agency position.

[REDACTED]

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Attachments: A and B

13 November 1979

MEMORANDUM FOR: Chief, Information Management Staff

STATINTL FROM:

Special Assistant to C/IMS

SUBJECT: "The Pentagon Papers" as Executive Disclosure

1. As you are aware, I have been faced with assertions by external official historians that references in what are popularly known as "The Pentagon Papers" constitute official disclosures which compel this Agency to release related classified documents under the mandatory or systematic review provisions of Executive Order 12065. My position has been that, while the study called "United States-Vietnam Relations, 1945-1967" which was printed for the House Committee on Armed Services in 1971 is in its declassified version a form of executive disclosure, it is not authorized executive disclosure as far as the Agency is concerned. Consequently, I have continued to deny Agency information which was improperly released at the time that the Department of Defense made its admittedly hasty classification review.

2. You will recall that we have had several off-the-cuff expressions from OGC attorneys concerning the point which has been raised. It was clear that none of those attorneys with whom I personally have spoken has had occasion to research the subject. They have tended toward the less protective view that executive disclosure is executive disclosure no matter what Executive Branch department or agency made it. In an information management field as complex as that of the Intelligence Community, I do not think that this contention is appropriate.

3. To determine whether or not there was documentary support for my view, I have made various inquiries. The most productive has given me an insight into action taken by the Agency in 1971. From a review of that material, which I am keeping in a file titled "Disclosure Problems: 'The Pentagon Papers'," I am convinced that the Agency never intended to make executive disclosure of its material at the time that the Department of Defense pressed on with publication of a DOD declassified version of the study which continued to include classified and other protectable CIA information.

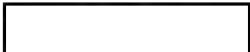
4. DDA/ISS/CRD did a study, dated 5 May 1979, which identified CIA material in "The Pentagon Papers" which CRD was apparently inclined to look upon as being in the public domain. I do not dispute that the information so identified is in the public domain; I do contend, however, that the Agency did not knowingly place that information in the public domain via "The Pentagon Papers." Therefore, unless subsequent authorized executive disclosure has been made by this Agency, we are not under any obligation to release the same or similar information. CRD is already aware of my views, but I shall send them a copy of this memorandum once you have concurred.



STATINTL

5 May 1979

MEMORANDUM FOR: All Branch Chiefs and Reviewing Officers

STATINTL FROM : 
Chief, Classification Review Group

SUBJECT : CIA Personnel (and OSS), Station Locations,
and Operations Exposed in the Pentagon Papers

1. Attached are comments and quotations from the 12 volumes (about 7,000 pages) of the Pentagon Papers which reveal and compromise CIA (and some OSS) personnel, station locations, and operations. This version of the Papers is the official one, the study prepared by the Department of Defense and printed for use of the House Committee on Armed Services by the U.S. Government Printing Office. The text is unclassified.

2. This material is to be used as a data base of names, station locations and operations material in the public domain, in the event we encounter references to the items in future reviews.

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Attachment: a/s

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United States - Vietnam Relations
1945 - 1967

Book 4 of 12 (only this page pertinent in Volume)

during the coming weeks and months. He has not responded affirmatively to this suggestion apparently because his own thoughts are not yet in order.

"The mission has been very busy since my return with all agencies reviewing their programs to see that they are aligned with the recent decisions taken in Washington. USOM Director Killen has discussed the 41 point non-military program with [] who has expressed particular interest in such projects as rural electrification, agricultural development, water supply and school construction. The Acting [] Chief, Mr. Jorgensen, is giving priority attention to the 12 outline projects which Mr. McCone tabled during our Washington discussions and will soon have specific proposals for the Mission Council."

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and the following excerpts from COMUSMACV's Monthly Evaluations for March and April 1965:

"March, 1965: Events in March were encouraging...RVNAF ground operations were highlighted by renewed operational effort... VC activity was considerably below the norm of the preceding six months and indications were that the enemy was engaged in the re-supply and re-positioning of units possibly in preparation for a new offensive, probably in the II corps area...In summary, March has given rise to some cautious optimism. The current government appears to be taking control of the situation and, if the present state of popular morale can be sustained and strengthened, the GVN, with continued U.S. support, should be able to counter future VC offenses successfully.

"April, 1965: Friendly forces retained the initiative during April and a review of events reinforces the feeling of optimism generated last month...In summary, current trends are highly encouraging and the GVN may have actually turned the tide at long last. However, there are some disquieting factors which indicate a need to avoid overconfidence. A test of these trends should be forthcoming in the next few months if the VC launch their expected counter-offensive and the period may well be one of the most important of the war." [Emphasis added]

In view of the fact that nothing had basically changed in the South, it seems inconceivable that anyone was really fooled by the dramatic drop in enemy-initiated activity. Most official observers were hardheaded and realistic following the landing of the two Marine BLT's in March. COMUSMACV certainly was in the long and detailed Commanders's Estimate of the Situation which he completed on 26 March and which will be analyzed at length later in this paper. In summary, General Westmoreland said in

United States - Vietnam Relations
1945 - 1967 (Study Prepared by the Dept. of Defense)
Book 5 of 12 (only one page marked)
Printed for the use of the House Committee on Armed Services

which had reduced significantly its impact and effectiveness. Limitations have been imposed on military operations in four ways, they indicated:

a. The attacks on the enemy military targets have been on such a prolonged, graduated basis that the enemy has adjusted psychologically, economically, and militarily, e.g., inured themselves to the difficulties and hardships accompanying the war, dispersed their logistic support system, and developed alternate transport routes and a significant air defense system.

b. Areas of sanctuary, containing important military targets, have been afforded the enemy.

c.

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d. Major importation of supplies into NVN by sea has been permitted.

The Chiefs indicated that they considered that U.S. objectives in SEA could be achieved within this policy framework providing the level of assistance the enemy received from his communist allies was not significantly increased and there was no diminution of U.S. efforts.

However, the Chiefs concluded pessimistically that progress would continue to be slow so long as present limitations on military operations continued in effect and, further, at the present pace, termination of NVN's military effort was not expected to occur in the near future.

The Joint Chiefs then listed a series of actions which could be taken in the near future to increase pressures on NVN and accelerate progress toward the achievement of U.S. objectives (see table, p.224) and recommended they be authorized to direct these actions.

The Joint Chiefs of Staff recognize that expansion of US efforts entails some additional risk. They believe that as a result of this expansion the likelihood of overt introduction of Soviet/Bloc/CPR combat forces into the war would be remote. Failure to take additional action to shorten the Southeast Asia conflict also entails risks as new and more efficient weapons are provided to NVN by the Soviet Union and as USSR/CPR support of the enemy increases. 94/

Information indicates that the President reviewed this paper and states that it was not what was desired, that it recommended actions which had previously been denied and would not now be approved.

United States - Vietnam Relations
1945 - 1967
Book 6 of 12

- 1 - "and George Carver the CIA" (p. 93) :

[REDACTED]

[REDACTED]

- 5 - "and the CIA Station Chief, who retained a completely independent communications channel to Washington" (p. 60)
- 6 - "the CIA gave lip service to the idea, without making any significant change in their training of the cadre at Vung Tau." (p. 61)
- 7 - "...and opposed the suggestion that Special Branch Police -- which meant on the American side the CIA -- take over the anti-infrastructure effort." (p. 86)
- 8 - "...from George Carver, Helms' Special Assistant for Vietnamese Affairs at the CIA;" (p. 103)

[REDACTED]

- 10 - "In Saigon, Zorthian, and Hart, Directors of JUSPAO and CIA, respectively,..." (p. 125)

United States - Vietnam Relations
1945 - 1967
Book 7 of 12 (only this page is pertinent)

The Embassy's Lack of Political Contact

The shifts of political loyalties, coups, rebellions, and major changes of public figures often caught the Embassy by surprise. It has no effective system, either through overt or covert contacts, for finding out what was going on. [REDACTED] a few official contacts, who told them things the Vietnamese wanted the U.S. to believe; but [REDACTED]

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